STATE OF MICHIGAN

IN THE SUPREME COURT

MARIE HUDDLESTON,

Plaintiff-Appellee,

-vs-

TRINITY HEALTH-MICHIGAN d/b/a SISTERS OF MERCY HEALTH CORPORATION and/or ST. JOSEPH MERCY HOSPITAL - ANN ARBOR; IHA OF ANN ARBOR, P.C. d/b/a ASSOCIATES IN INTERNAL MEDICINE - CHERRY HILL; ASSOCIATES IN INTERNAL MEDICINE-CHERRY HILL, P.C. and DR. JOYCE LEON,

Defendants-Appellants.

Supreme Court No. 146041

Court of Appeals No. 303401

Washtenaw County Circuit Court
No. GCW 09 657 NH

146041
PLACES

PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellee
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

SCHREIER & SCHREIER

SHERWIN SCHREIER (P20065)
Attorney for Plaintiff-Appellee
24892 Woodward Avenue
Royal Oak, MI 48067
(248) 548-4800

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page**

Statutes

Court Rules

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT DENY THE DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL SINCE THE COURT OF APPEALS CORRECTLY RULED THAT MS. HUDDLESTON HAS A VALID CLAIM FOR DAMAGES BASED ON DEFENDANTS' MALPRACTICE?

Plaintiff-Appellee says "Yes".

Defendants-Appellants say "No".

COUNTERSTATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Marie Huddleston went to see her primary care physician, Dr. Joyce Leon, on May 23, 2003, complaining of chest pain radiating to her back. Dr. Leon ordered chest and abdominal CT scans. These scans were performed at a St. Joseph Mercy Hospital facility on June 9, 2003. Dr. David Baker interpreted both the abdominal and chest CT's. The latter was reported as normal. The CT scan of the abdomen, however, revealed the presence of a cystic lesion on Ms. Huddleston's left kidney measuring 2.7 cm by 2.5 cm. Dr. Baker wrote a report recommending a dedicated renal CT scan. No further steps were taken to investigate the cystic lesion that Dr. Baker identified.[1]

Approximately five years later, in June 2008, Ms. Huddleston sought treatment at St. Joseph Mercy because of chest pain. She underwent a CT angiography of the thoracic and abdominal aorta, which again revealed the presence of a mass on her left kidney. The mass was described as typical for renal cell carcinoma. By this time, the mass on Ms. Huddleston's kidney had increased in size to 5.2 cm by 4.4 cm.

The mass of Ms. Huddleston's kidney proved to be malignant. She was shocked when she discovered that the cancerous lesion had showed up on the June 2003 CT scan, but she had never been advised of that fact. Shortly after the cancer was diagnosed, Ms. Huddleston made an appointment with Dr. Leon. That office visit was documented by Dr. Leon in a record that is attached hereto as Exhibit A. In that document, Dr. Leon reported that Ms. Huddleston was angry because of Dr. Leon's failure to respond to Dr. Baker's June 2003 interpretation of the abdominal CT scan.

---

[1]Precisely why no follow-up was ever performed after Dr. Barker's report is a subject of significant dispute in this case. That dispute is not relevant to the issues raised in defendants' application for leave.

By the time Ms. Huddleston's cancer was diagnosed in 2008, the complete removal of the kidney was required. On August 28, 2008, two months after the cancer was diagnosed, a total left nephrectomy was performed.

On June 5, 2009, Ms. Huddleston filed this medical malpractice action against Dr. Leon and St. Joseph Hospital. Accompanying Ms. Huddleston's complaint was an affidavit signed by Dr. Steven Jenson, a board certified urologist. A copy of that affidavit is attached hereto as Exhibit B. In his affidavit, Dr. Jenson indicated that, if a board certified urologist had reviewed the 2003 abdominal CT scan, the renal cell carcinoma would have been diagnosed. Jenson Affidavit (Exhibit B), ¶ 3.

Dr. Jenson further indicated in his affidavit that if Ms. Huddleston's condition were diagnosed in 2003, a wedge resection of the mass could have been performed, which would have resulted in the removal of only 10% - 20% of Ms. Huddleston left kidney. *Id.*, ¶3. Thus, if the appropriate diagnosis had been made in 2003, the treatment of the cancer would have left Ms. Huddleston with two functioning kidneys - something she did not have after the 2008 nephrectomy. *Id.*, ¶4.

On October 30, 2009, Ms. Huddleston was evaluated by Dr. Michael Jacobs because of a suspected gastric nodule. Dr. Jacobs' differential diagnosis included possible metastatic renal cell carcinoma. Dr. Jacobs recommended surgical removal of the nodule. That surgery, which was performed slightly over two months later, revealed that the nodule was not metastatic renal cell carcinoma.

Following the completion of discovery, Dr. Leon moved for summary disposition on the ground that Ms. Huddleston's claim failed because she suffered no damages as a result of the

defendants' negligence. A copy of that motion and the brief accompanying it are attached as Exhibit C. The circuit court agreed with defendants' arguments and dismissed Ms. Huddleston's case.

Ms. Huddleston appealed to the Court of Appeals which, on September 11, 2012, issued an unpublished opinion reversing the circuit court's grant of summary disposition to Dr. Leon. Contrary to the circuit court's ruling, the Court of Appeals majority found that Ms. Huddleston sustained a compensable injury:

> Here, the injury claimed is the more extensive surgery, i.e., the removal of Huddleston's entire kidney rather than removal of only part of her kidney. There is no question that there was significant growth of the cancerous tumor on her kidney between when it was initially revealed in June 2003 (but not reported to her) and June 2008 when another scan showing the tumor was reported to Huddleston and addressed. The 2003 report notes a 2.7 x 2.5 cm lesion. The 2008 report notes a 5.2 x 4.4 cm lesion. Dr. Michael Sarosi, who read the 2008 radiology report notes: "This lesion has enlarged significantly since the prior study."
>
> Opinion (Defendants' Application Exhibit AA), at

Dr. Leon applied for leave to appeal in this Court. On April 3, 2013, the Court issued an order granting oral argument on Dr. Leon's application for leave. *Huddleston v Trinity Health Michigan*, 493 Mich 958; 828 NW2d 383 (2013). In its order, the Court indicated that among the issues it wanted addressed was whether the Court of Appeals erred in concluding that Ms. Huddleston had a compensable injury and whether the panel's determination was inconsistent with two prior decisions of this Court, *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966) and *Henry v Dow Chemical*, 473 Mich 63; 701 NW2d 684 (2005).

ARGUMENT

THE COURT SHOULD DENY LEAVE TO APPEAL SINCE THE COURT OF APPEALS PROPERLY CONCLUDED THAT SUMMARY DISPOSITION WAS NOT APPROPRIATE ON THE QUESTION OF WHETHER MS. HUDDLESTON HAS A VALID CLAIM FOR DAMAGES RESULTING FROM DEFENDANTS' MALPRACTICE.

Ms. Huddleston brings this case to recover her noneconomic damages arising out of the defendants' 2003 malpractice in which Dr. Leon failed to advise her of a cancerous lesion on her kidney. The circuit court ruled that summary disposition was appropriate on Ms. Huddleston's malpractice claim because, in its view, Ms. Huddleston sustained no damages resulting from the malpractice. The Court of Appeals reversed that ruling. The Court of Appeals' ruling was entirely correct and entirely consistent with established Michigan law. Because the Court of Appeals arrived at the correct result in its unpublished decision, there is no reason for this Court to review that decision.

Analysis of the issue presented in this case should begin with a discussion of the scope and the source of a noneconomic damage recovery.

In medical malpractice actions, the types of noneconomic damages recoverable are governed both by a statute and by common law. MCL 600.1483 places a limitation on the amount of noneconomic damages that a plaintiff may recover in a malpractice action. A subsection of that statute, MCL 600.1483(3), provides the definition of "noneconomic loss." That subsection defines such loss as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss."

The last four words of §1483(3) serve to include in that statute's coverage traditional common law notions of noneconomic damages. These include mental anguish, fright and shock,

denial of social pleasure and enjoyments, embarrassment, humiliation and mortification. *See* MCivJI 50.02. Noneconomic damages may also be awarded for mental pain, outrage, anxiety and annoyance. *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982); *Beath v Rapid Ry Co*, 119 Mich 512, 518; 78 NW 537 (1899).

Like most states, Michigan law requires a "triggering" event for the award of such damages. That "trigger" consists of proof that the plaintiff has sustained an "injury," *i.e.* some physical consequence of the defendants' negligence.[2] This Court has recognized that "[r]ecovery for mental disturbance caused by defendants' negligence, but without accompanying physical injury or physical consequences . . . has been generally denied . . ." *Daley v LaCroix*, 384 Mich 4, 8; 179 NW2d 390 (1970); *Henry v Down Chemical Co*, 473 Mich 63, 79, n. 9; 701 NW2d 684 (2005). Thus, there must ordinarily be physical contact or physical consequences flowing from a defendants' negligence before a plaintiff may recover damages.

Courts have been reluctant to allow purely emotional upset damages in the absence of physical contact or physical consequences resulting from the defendant's negligence Prosser & Keeton, Torts (5th ed) (hereinafter: Prosser), §54 at 359-362; 2 Dobbs, Hayden and Bublick, The Law of Torts (2nd ed), §383, at 538-542.[3] But, the law has never been hesitant to award damages where

---

[2]The discussion that follows is limited to tort actions grounded in negligence. There are several other torts, *e.g.* assault, defamation, malicious prosecution, which are designed to allow for recovery of emotional upset in the complete absence of a physical injury or physical consequences. 2 Dobbs, Hayden, and Bublick, The Law of Torts (2nd ed), §382, at 535-536; Prosser & Keeton, Torts (5th ed), §12, at 56. These independent torts, therefore, do not require any physical effects on the part of the plaintiff.

[3]Despite this general rule, this Court held in *Daley* that a plaintiff may recover for purely emotional injuries without initial physical contact or physical "injury" where plaintiff's injuries later produce an objective physical injury. 384 Mich at 12. Michigan courts have also found purely emotional injuries recoverable in a narrow class of cases generally classified as negligent

such physical contact or physical consequences exist. *Daley*, 384 Mich at 8 (characterizing such damages as "parasitic") As expressed in Prosser:

> Where the defendants' negligence inflicts an immediate physical injury, such as a broken leg, none of the foregoing objections has prevented the courts from allowing compensation for the purely mental elements of damage accompanying it, such as fright at the time of the injury, apprehension as to its effects, nervousness, or humiliation at disfigurement. With a cause of action established by the physical harm, "parasitic" damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.
>
> *Id.*, §54 at 362-363.

Because Michigan law normally requires a triggering event, an "injury," before damages may be awarded, it is important to separate two questions: (1) whether Ms. Huddleston has suffered an "*injury*" as a result of the defendants' malpractice and (2) whether Ms. Huddleston has suffered or will suffer *damages* as a result of that injury. The Court made this distinction a central part of its holding in *Henry,* when it ruled that a court need not even reach the question of whether the plaintiff has sustained *damages* where the plaintiff cannot establish an injury. 473 Mich at 75-76.[4]

The initial question presented in this action based on medical malpractice is whether the "injury" requirement that generally applies in Michigan negligence law is applicable to such a claim. MCL 600.1483(1) provides the extent of the "noneconomic loss" that may be awarded in a malpractice action "resulting from the negligence of all defendants." This statue further defines

---

infliction of emotional distress. *Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999).

[4]With this distinction in mind, plaintiff would note at least some degree of ambiguity in the Court's April 3, 2013 order granting oral argument on defendants' application. That order asked for briefing on the question of whether Ms. Huddleston "suffered a compensable injury." While the Courts order uses the word "injury," the phrase "compensable injury" would appear to apply to her damages, *i.e.*, whether she has sustained damages resulting from her injury that may be awarded by court or jury.

"noneconomic loss" as including "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement or other noneconomic loss." MCL 600.1483 fixes the noneconomic *damages* that may be awarded in a medical malpractice action. There is nothing in that statute indicating that these damages may only be "triggered" by a physical injury or physical consequences resulting from the defendants' malpractice.

But, in any event, even if the general "injury" requirement for an award of damages exists in this case, there really is no question that Ms. Huddleston satisfies it.

This Court recognized in both *Daley* and *Henry* that the "injury" necessary to give rise to a claim for damages in negligence consists of "physical injury or physical consequences" resulting from the defendant's negligence. *Daley*, 384 Mich at 8; *Henry*, 473 Mich at 79, n. 9. Here, there were obvious "physical consequences" for Ms. Huddleston due to defendants' malpractice.

The most obvious physical consequence resulting from the defendants' negligence in this case is that Ms. Huddleston's left kidney had to be removed. If the appropriate diagnosis of Ms. Huddleston's cancer had been made in 2003, only a small portion of her left kidney would have had to be removed. It was only because of defendants' malpractice that Ms. Huddleston's entire kidney had to be removed. This represents a "physical consequence" of the defendants' negligence.

Moreover, as a result of defendants' negligence, a cancerous mass on Ms Huddleston's kidney nearly doubled in size between the date of defendants' malpractice and the date that the mass was eventually diagnosed. This growth also represents a "physical consequence" of the defendants' negligence. *Cf Evers v Dolunger*, 95 NJ 399; 471 A2d 405, 410 (1984) ("An increase in the size of a malignant tumor, by definition, results in the spread of cancer cells into once healthy tissue, and therefore is an injury in and of itself."); *Cloys v Turbin*, 608 SW2d 697, 701 (Tex Civ App 1980).

Once this "injury" threshold is satisfied, Ms. Huddleston is entitled to recover all of the noneconomic damages flowing from the defendants' negligence. The causal relationship between that negligence and her damages was described by this Court in *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966):

> The general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the tortfeasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote contingent, or speculative damages are not considered in conformity to the general rule.

Id. at 86.

Ms. Huddleston has alleged and can prove various emotional upset damages resulting from the defendants' malpractice. For example, she learned in 2008 that she had a malignancy on her left kidney and that this cancer had been both detected in a CT scan performed five years before and flagged for further investigation by the radiologist who read that scan. Yet, nothing was done to address this lesion.

Ms. Huddleston's natural reaction when she learned of the medical mistakes which allowed a cancerous mass to remain on her kidney for five years constitutes the type of outrage, pain, suffering, fright, shock, or mental anguish routinely recoverable in a negligence action. The existence of Ms. Huddleston's mental distress damages is actually supported by Dr. Leon's own records.

Between the time Ms. Huddleston's cancer was first diagnosed and the surgery to remove her kidney, Ms. Huddleston went to Dr. Leon's office to discuss her diagnosis and treatment. In her records of this meeting, Dr. Leon indicated that Ms. Huddleston was "angry" over the fact that the

cancer had not been found 5 years before. *See* Exhibit A. Thus, Dr. Leon's own notes manage to record the emotional distress and outrage that Ms. Huddleston experienced upon learning of the defendants' malpractice. This emotional distress and outrage is unquestionably an item of damages recoverable in this case. *Veselnak*, 414 Mich at 574.

In addition, Ms. Huddleston learned in 2008 that this five year delay in diagnosis increased the scope of the treatment necessary for her condition. She learned that, because of the malpractice, she could no longer undergo a wedge resection of the cancer which would have left her with two functioning kidneys. Rather, Ms. Huddleston had to have her entire left kidney removed, leaving her with only one kidney. Once again, because a defendant "is liable for all injuries resulting directly from his wrongful act," *Sutter*, 372 Mich at 81, Ms. Huddleston's emotional distress damages associated with the fact that defendants' malpractice cost her one of her kidneys is also compensable.

In addition, one of the elements of emotional damages under Michigan law is the plaintiff's anxiety resulting from the defendants' negligence, *Velselanak*, 414 Mich at 574; *Beath*, 119 Mich at 518. As Prosser puts it, a plaintiff in a negligence action may recover emotional distress damages associated with the "apprehension as to the effects" of her injury. Prosser, §54, at 363. Ms. Huddleston has testified that she lives in continuing apprehension over the fact that, because of the malpractice that occurred in this case, any damage to her right kidney could leave her without a kidney. *Cf Birkhill v Todd*, 20 Mich App 356, 365-366; 174 NW2d 56 (1970) (recognizing that "anxiety or worry about a possible future disease or condition may constitute a proper element of damages, as a component of that mental anguish accompanying physical injury.")

Ms. Huddleston's fears over her future were enforced by events that occurred after she filed this case. In October 2009, her doctor found a gastric nodule which he initially identified as a

possible recurrence of her renal cell carcinoma. While this nodule later proved not to be cancerous, Ms. Huddleston may seek her emotional upset damages associated with her doctor's differential diagnosis of possible renal cell carcinoma.

Ms. Huddleston suffered damages as a result of defendants' malpractice. She has to date sustained emotional distress resulting from defendants' failure to diagnose her cancer in 2003. Moreover, she will continue to experience the anxiety and apprehension associated with defendants' malpractice which required the sacrifice of one of her kidneys.

Ms. Huddleston's claim for damages in these circumstances is neither novel nor fanciful. Indeed, this Court has explicitly authorized recovery of the types of damages that Ms. Huddleston seeks in this case. In *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001), the plaintiff sued a hospital and its agents for their failure to diagnose breast cancer. That failure resulted in a one year delay in the diagnosis of plaintiff's condition. Plaintiff alleged in *Wickens* that this one year delay required more invasive treatment methods to treat her cancer and that it caused her emotional distress. Plaintiff further alleged that because the cancer was not diagnosed earlier, she suffered additional damages because her ten year survival rate dropped from 70% to 55%.

The Court in *Wickens* perceived this latter claim as one for the loss of opportunity to survive predicated on the second sentence of MCL 600.2912a(2).[5] The Court ruled in *Wickens* that the plaintiff could not pursue a loss of opportunity theory because such a claim was only available to a party who had already died. Since the plaintiff in *Wickens* was still alive, the Court found that she

---

[5]That sentence of MCL 600.2912a(2), whose precise parameters have proven elusive, *see O'Neal v St. John Hospital & Medical Center*, 487 Mich 485; 791 NW2d 853 (2010) and *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), specifies that, [i]n an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."

had no claim for a loss of the opportunity to survive. 465 Mich 59-61.

The *Wickens* Court's construction of the second sentence of §2912a(2) and its discussion of lost opportunity damages are of no relevance to the issues presented in this case. What *is* relevant in the *Wickens* opinion is this Court's analysis of what remained of the plaintiff's cause of action in the absence of her claim based on loss of opportunity. The Court ruled that the failure of plaintiff's loss of opportunity claim could not result in the complete dismissal of her case since she had other types of recoverable damages:

> The trial court erred in dismissing plaintiff's entire case on the ground that it was barred by application of subsection 2912a(2). The ten-year-survival-rate statistics say nothing about plaintiff's chances of avoiding the *other* injuries she allegedly suffered, such as (1) the more invasive medical treatments caused by the one-year delay in her diagnosis, (2) the emotional trauma attributable to her unnecessarily worsened physical condition, and (3) the pain and suffering attributable to her unnecessarily worsened physical condition. Because of these alleged injuries, the trial court should not have dismissed plaintiff's case in its entirety on the basis of subsection 2912a(2).
>
> *Id.* at 61-62.

Thus, in a comparable medical malpractice action premised on a failure to appropriately diagnose cancer, this Court recognized in *Wickens* that the plaintiff could recover damages both for the more invasive treatments the delay in diagnosis caused and for the emotional upset injuries that plaintiff sustained due to the malpractice.[6] This Court's analysis in *Wickens* demonstrates rather clearly why the circuit court erred in reaching the conclusion that Ms. Huddleston suffered no damages resulting from defendants' malpractice.

In its April 3, 2013 order granting oral argument on the application, the Court posed the

---

[6]The Court's decision in *Wickens* is also relevant to the "physical injury" requirement for a negligence action discussed previously. Obviously, the Court in *Wickens* would never have gotten to the question of whether the plaintiff had suffered *damages* the would be recoverable in a negligence action unless she had suffered an *injury*.

question of whether the Court of Appeals majority's ruling in this case is contrary to this Court's decision in *Henry*. Based on the widely recognized principles of tort law discussed previously, there is one enormous difference between this case and *Henry*.

The plaintiffs in *Henry* were a class of residents in the flood plain of a river that the defendant had polluted with toxic substances. The plaintiffs alleged that the defendant's negligence had created the risk of disease or other physical injury that might manifest itself in the future. Based on the risk of such future injury, the plaintiffs in *Henry* requested that the court create and administer a program funded by the defendant that would assume the cost of monitoring the health of the members of the plaintiff class. This Court ruled in *Henry* that Michigan common law does not recognize such a medical monitoring claim.

The entire reasoning behind that ruling was based on one essential quality of the plaintiffs' claim in *Henry* - they were seeking compensation based on the defendant's negligence despite the fact that they had not yet suffered any *present injury* due to that negligence. As discussed previously, the Court reinforced in *Henry* that damages in a negligence action could only be triggered where the plaintiff can establish a present injury:

> Plaintiffs have not cited an exception to the rule that a present physical injury is required in order to state a claim based on negligence. Nor, indeed, does the dissent. We can therefore reach only one conclusion: if the alleged damages cited by plaintiffs were incurred in anticipation of possible future injury rather than in response to present injuries, these pecuniary losses are not derived from an injury that is cognizable under Michigan tort law.
>
> However, if plaintiffs' claim is that by virtue of their potential exposure to dioxin they have suffered an "injury," in that any person so exposed would incur the additional expense of medical monitoring, then their claim is also precluded as a matter of law, *because Michigan law requires an actual injury to person or property as a precondition to recovery under a negligence theory.*

Id. at 23 (emphasis added).

The legal issue under consideration in *Henry* is unmistakable. The Court found plaintiffs' claims to be novel because they had suffered no physical injury, the "precondition to recovery under a negligence theory." *Id.* Over 30 times in the *Henry* majority opinion, the Court identified *present* injury as an essential component of a negligence claim and it further identified the plaintiffs' lack of such a *present injury* as the basis for rejecting their medical monitoring claim. *Id.* at 68, 72-79, 83-84).

The holding in *Henry* has no application in a case such as this where Ms. Huddleston has established that she suffered physical consequences as a result of defendants' negligence. These physical consequences included the growth of her cancer over the five year period it went diagnosed and the more radical surgery - nephrectomy - resulting from the malpractice.

While the holding in *Henry* does not control this case, there are several isolated statements in that opinion that deserve additional consideration. The sole issue presented in *Henry* was whether the plaintiff could make out a claim for negligence in the absence of a present physical *injury.* In addressing this question, the *Henry* Court drew a distinction between *injuries* that the plaintiff may have and any *damages* recoverable for those injuries. 473 Mich at 75-76. Thus, when the Court in *Henry* referred to future (as opposed to present) *injuries*, it was not addressing the plaintiff's right to future *damages* available in those circumstances in which the "present injury" precondition for recovery in negligence is satisfied.

For example, the *Henry* opinion contains the following statement: "If plaintiffs' claim is for *injuries* they may suffer in the future, their claim is precluded as a matter of law, because Michigan law requires more than a merely speculative *injury.* *Id* at 72 (emphasis added). In making this

statement, the Court was *not* addressing the scope of future *damages* that would be available to a plaintiff. This has to be a correct reading of the Court's decision in *Henry* since the existence of a "present injury" was identified in that case as a "precondition to recovery." Since the Court in *Henry* found no physical injury, the simple fact is that the *Henry* Court has no reason to address the scope of the plaintiffs' damages.

Thus, the Court in *Henry* was not upsetting a multitude of prior Michigan cases by suggesting that the recovery of future *damages* would be inappropriate because those damages would be "speculative."[7] What the *Henry* Court was, instead, addressing was that the plaintiffs therein could not establish the triggering mechanism for an award in negligence -- a present *injury* -- by hypothesizing such a future injury. Thus, to the extent that the emotional distress that Ms. Huddleston has experienced continues into the future, those damages are recoverable precisely because she (unlike the plaintiffs in *Henry*) has sustained a present physical injury.

The Court also stated in *Henry* that "[t]he threat of future harm, not yet realized, is not enough" to support a negligence claim. *Id.*, at 75. Once again, this statement was addressed to the

---

[7]By their very nature, future damages of any kind are premised on some degree of speculation. The Court recognized this fact in *Byer v Smith*, 419 Mich 541; 357 NW2d 644 (1984), where it noted that "[t]he tort measure of damages requires the fact finder to make *a prediction* regarding future damages." *Id* at 545 (emphasis added); *see also Pike v City of Lansing*, 431 Mich 589; 607 NW2d (1988) (J. Brickley concurring); *Sherrell v Bugaski*, 169 Mich App 10, 15; 425 NW2d 707 (1988). The fact that these damages are, by necessity, predictions does not mean that they may not be awarded. The Court has held that in the awarding of damages, "[t]he law does not require impossibilities, and cannot therefore require a higher degree of certainty that the nature of the case admits." *Muskegon Agency, Inc. v General Telephone Company of Michigan*, 350 Mich 41, 50; 85 NW2d 170(1957); *McCallagh v Goodyear Tire & Rubber Company*, 342 Mich 244, 254;69 NW2d 731 (1955). Instead, the Court has cautioned that, where precise proof of damages is impossible, "we do the best we can with what we have." *Fera v Village Plaza, Inc.*, 396 Mich 639, 648;242 NW2d 302 (1976); *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368;137 NW2d 151 (1965).

existence of a present *injury* necessary to support a negligence claim; it is not a statement as to the scope of the future *damages* that a plaintiff may recover where the present injury requirement is satisfied. Once a plaintiff (such as Ms. Huddleston) has established that she suffered an *injury* due to a defendant's negligence, that plaintiff may recover all of her past and future emotional upset damages resulting from that negligence.

The distinction that must be drawn between this case and *Henry* is aptly demonstrated in two decisions of the Supreme Court of the United States construing claims brought under what amounts to a federal law tort system, the Federal Employers' Liability Act (FELA), 45 USC §§51, *et seq.*[8]

In *Metro-North Commuter Railroad Co v Buckley*, 521 US 424 (1997), the Supreme Court considered a medical monitoring claim brought by a plaintiff who had been subject to work-related asbestos exposure. However, at the time the plaintiff in *Metro-North* brought his case, he had not yet suffered any symptoms of an asbestos related injury. While recognizing that there was no dispute that a plaintiff could recover medical monitoring costs if and when he developed symptoms related to asbestos exposure, *id* at 438, the Supreme Court held in *Metro-North* that medical monitoring costs were not recoverable by the plaintiff because he had not yet suffered such symptoms. *Id.* at 439-444.

---

[8]It is significant that the law to be applied in an action under FELA is the general common law. *Consolidated Rail Corp v Gottshall*, 512 US 532, 543 (1994). Thus, the two Supreme Court decisions discussed herein are the result of the Court's application of general common-law principles.

The Court in *Metro-North*, consistent with this Court's later decision in *Henry*,[9] rejected plaintiff's argument that medical monitoring "by itself constitutes a sufficient basis for a tort recovery." *Id.* at 440. In reaching this result, the Supreme Court recognized that the facts in *Metro-North* were to be distinguished from "recovery-permitting circumstances *such as the presence of a traumatic physical impact or the presence of a physical symptom.*" *Id.* (emphasis added).

The decision in *Metro-North* is directly comparable to *Henry* in both its ultimate holding and the reasoning used in arriving at that holding. The Court held in *Metro-North* that a plaintiff without existing symptoms of an injury or illness could not proceed on a medical monitoring claim, while distinguishing those situations in which the plaintiff actually suffers a physical injury or physical condition resulting from the defendant's negligence.

Six years after *Metro-North* was decided, the Supreme Court had before it a FELA claim brought by a plaintiff who was suffering from asbestosis as a result of asbestos exposure, *Norfolk & Western Railway Co v Ayers*, 538 US 135 (2003). In *Ayers*, the plaintiffs alleged that they were entitled to recover all of their emotional upset damages, including there apprehension over the fact that they might suffer harm in the future.

In *Ayers*, the Court began its analysis by noting that the parties did not dispute that asbestosis was an "injury" and that, once found liable for any such bodily harm, "a negligent actor is answerable in damages for emotional disturbance 'resulting from the bodily harm *or from the conduct which causes it.*'" *Id.* at 154 (emphasis in original).

---

[9]The *Metro-North* decision was cited several times in *Henry* in support of this Court's conclusion that the plaintiffs therein could not recover medical monitoring costs. 473 Mich at 85.

The Court in *Ayers* stressed that the plaintiffs therein could not seek damages for the increased risk of a future injury, *ie.* the development of cancer, but they were entitled to the mental distress damages they experienced in the present:

> But the asbestosis claimants did not seek, and the trial court did not allow, discrete damages for their *increased risk* of future cancer. ("[Y]ou cannot award damages to plaintiffs for cancer or for any increased risk of cancer."). Instead, the claimants sought damages for their *current* injury, which, they allege, encompasses a *present fear* that the toxic exposure causative of asbestosis may later result in cancer. The Government's "*when,* not *whether*," argument has a large gap; it excludes recovery for the fear experienced by an asbestosis sufferer who never gets cancer. For such a person, the question of *whether*, not *when*, he may recover for his fear.

Id. at 153.

Metro-North and *Ayers* demonstrate precisely why Ms. Huddleston's this case must be separated from the holding in *Henry*. The rejection of medical monitoring claims in both *Metro-North* and *Henry* was the direct result of the fact that the plaintiff asserting that claim had no present injury. But, when the plaintiff has in fact sustained such an injury, as in *Ayers* and this case, the plaintiff is entitled to recover all emotional upset damages resulting from defendant's conduct.

In its April 3, 2012 order, the Court also requested that the parties address at oral argument the potential application of its 1966 decision in *Sutter*. *Sutter* involved a woman who, as a young girl in 1940, had an operation during which the surgeon improperly removed her right fallopian tube and ovary. The plaintiff in *Sutter* was unaware of this fact until 19 years later when a cyst required additional surgery during which her left fallopian tube had to be removed. While the plaintiff could have had children with only one fallopian tube, she could never become pregnant once she did not have either of her fallopian tubes.

The plaintiff in *Sutter* brought suit against the physician responsible for her 1940 surgery, raising two distinct damage claims. She asserted that the defendant's removal her right fallopian tube in 1940 contributed to her infertility and that, as a result, she should be awarded all damages associated with that injury. Additionally, plaintiff claimed that she should be compensated for all damages associated with the 1940 surgery itself.

At the trial on these claims, the court directed a verdict on plaintiff's damage theory based on her infertility. The court concluded that the defendant's removal of one of plaintiff's fallopian tubes could not be considered a proximate cause of her inability to bear children since defendant's tortious conduct left plaintiff with one functioning fallopian tube. The remainder of plaintiff's damage claims was submitted to the jury, which awarded $7,500.00 in damages associated with the defendant's removal of plaintiff's left fallopian tube during the 1940 surgery.

On appeal, this Court affirmed the trial court's directed verdict on plaintiff's claim for the damages associated with her infertility. The *Sutter* Court found that plaintiff's inability to bear children was not "a legal and natural consequence of defendant's wrongful act" since it was contingent on the later act that required removal of plaintiff's remaining fallopian tube. *Id.* at 87. But, while rejecting the plaintiff's claim for damages based on her infertility, the Court in *Sutter* did not disturb the jury's award of damages predicated on the 1940 surgery itself.

Ms. Huddleston's claims are not analogous to the theory of damages found improper in *Sutter*. The Court ruled in *Sutter* that where the defendant's negligence did not directly cause the ultimate injury being claimed, *i.e.* plaintiff's infertility, the defendant could not be held responsible for subsequent contingencies that made this injury a reality. Ms. Huddleston makes no such claim for recovery in this case. She is not contending that a subsequent event that is the product of an

outside force has deprived her of her other kidney. The proximate cause ruling announced in *Sutter* might be relevant if, after the defendants herein failed to appropriately address the cancer in Ms. Huddleston's left kidney in 2003, she later lost her right kidney for some reason unrelated to the defendants' negligence. These are not the circumstances of this case.

While the holding of the *Sutter* Court on the plaintiff's damage claim based on infertility is inapplicable to these facts, the other aspect of the plaintiff's damage claim in *Sutter* is relevant. The plaintiff in *Sutter* was allowed to pursue a claim for damages based on the 1940 surgery itself. Thus, the plaintiff was allowed recovery of damages based on the defendant's actual tortious conduct. That is precisely what Ms. Huddleston seeks in this case.

Ms. Huddleston is requesting damages associated with the defendants' tortious acts that occurred in 2003 when defendants failed to treat her cancer. She is, under the *Sutter* Court's analysis, "entitled to all injuries resulting from [this] wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act." *Id.* at 86. All of the emotional upset damages that are the subject of this care are the direct result of the defendants' 2003 malpractice. *Sutter* reinforces the fact that these damages are recoverable.

Finally, a brief rejoinder to the Court of Appeals dissenting opinion is probably in order. In that dissent, Judge Michael Talbot would have affirmed the circuit court's grant of summary disposition on the ground that Ms. Huddleston could not prove any damages.

Judge Talbot's view of Ms. Huddleston's claim was firmly fixed on Ms. Huddleston's loss of her kidney and whether she suffered any compensable injury based purely on that loss. Thus, Judge Talbot noted that the functioning of Ms. Huddleston's one remaining kidney would not be any different than two healthy kidneys. He further noted that the loss of a kidney would not appreciably

affect any medical restrictions on her activities nor would it affect her status as a potential kidney donor.

All of these observations in the dissent may be accurate, but they fail to address the emotional upset damages that Ms. Huddleston claims. On this subject, Judge Talbot wrote only:

> Additionally, Huddleston's argument that the alleged delay in diagnosis caused her to suffer mental anguish lacks merit. There was no evidence presented that the mental anguish Huddleston allegedly experienced was proximately caused by the negligence claimed in this case and not by the diagnosis of cancer itself. Therefore, I would find that the trial court properly granted summary disposition in favor of IHA, Leon and the Hospital because Huddleston did not suffer a "compensable injury."

Judge Talbot's determination that there was no evidence that Ms. Huddleston's emotional damages were proximately related to defendants' negligence is curious in light of the fact that this proximate cause issue and, for that matter, Ms. Huddleston's emotional upset damages were never even challenged in the defendants' motion for summary disposition. *See* Motion (Exhibit C). A review of that motion demonstrates that the defendants offered only a generic argument that Ms. Huddleston suffered no damages. That motion does not separately address Ms. Huddleston's emotional upset damages nor did it assert, as Judge Talbot later found, that these emotional distress damages were somehow unconnected to the defendants' malpractice.

Judge Talbot was apparently of the view that summary disposition may be granted where the plaintiff fails to present evidence rebutting an argument that was never made in support of that motion. Not surprisingly, this view of the summary disposition process is wrong. A party moving for summary disposition has the initial burden of identifying the issues on which it believes summary disposition is appropriate and the additional burden of supporting its position with appropriate evidentiary support. MCR 2.116(G)(4).

Thus, to the extent the defendants were intent on challenging the causal relationship between their negligence and Ms. Huddleston's emotional distress claims, defendants had to identify that issue as one on which they were seeking judgment as a matter of law and they had to support their position as MCR 2.116 requires. Defendants did not do so. Contrary to Judge Talbot's conclusions, defendants cannot obtain summary disposition on the basis of arguments that they never made simply because plaintiff failed to present the proofs necessary to rebut these (never-made) arguments.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellee Marie Huddleston respectfully request that this Court deny the defendants' application for leave to appeal in its entirety.

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellee
225 South Troy Street, Suite 120
Royal Oak, Michigan 48067
(248) 546-4649

SCHREIER & SCHREIER

SHERWIN SCHREIER (P20065)
Attorney for Plaintiff-Appellee
24892 Woodward Avenue
Royal Oak, MI 48067
(248) 548-4800

Dated: September 13, 2013

(A)

Acute Office Visit
07/02/2008 10:52 AM

Marie Huddleston
Sex: Female Age: 52 Years, D.O.B: 08/16/1955
Patient of: Joyce Leon MD, Seen by: Joyce Leon MD

CHIEF COMPLAINTS/CONCERNS

Renal Cell Carcinoma (follow-up) Pt states she is here to discuss surgery.

HUDDLESTON, MARIE 8/16/55 Cherry Hill 7/2/08

RV: Patient is accompanied by her daughter who is present for the duration of the visit. This visit was for the purposes of the events of the past 10 days leading to the patient's presumptive diagnosis of renal cell cancer. Patient is angry over this diagnosis. This is complicated by the fact of the existence of a CT Scan from 6/03, that was never made available to myself. I discussed this openly with the patient that this did not exist in her chart. But if I had been aware of this test result that I certainly would have followed up on it. I also shared with her that if this test result had existed in her chart and I had missed it I would certainly be profusely apologizing to her at this point, however I never had access to these results until they were brought to my attention sometime last week. I discussed the patient's health status with her, the implications of Von Willebrand's the logistical difficulty related with partial nephrectomy. I am fully supportive of her desire to have a second opinion with Dr. Haffron at Beaumont. She already has a referral to Dr. Sayed. I suggested that she discuss with my referral specialist and how they referrals will be conveyed to these physicians offices. I reviewed with her her test results showing that there is no evidence of metastatic disease. I assured I will continue to be supportive of her. Patient had all of her questions answered to her satisfaction. She was reassured by the fact that I had no prior knowledge of her previous CT scan.

Joyce Leon, M.D./cs

ASSESSMENT / PLAN

renal cell ca

, Chronic.

MEDICATIONS

New/active/changed	Unit	Sig	Start	Stop
Tramadol Hcl	50mg	1T PO BID prn	08/10/2007	
Doxycycline Hyclate	100mg	1T bid	07/17/2007	
Proair Hfa	90mcg	2p PO QID PRN	06/28/2006	

ADDITIONAL DETAIL

HISTORY

0

ALLERGIES

Description
Aspirin
Codeine

CHRONIC CONDITIONS

FAMILY HISTORY

Reviewed.

SOCIAL HISTORY

General Information: Occupation: sales rep.
Marital status is married.
Tobacco: Non-smoker.

Assoc In Internal Med Cherry Hill
49650 Cherry Hill Road Suite 120
Canton, MI 481874650
(734)398-7800

(B)

AFFIDAVIT OF MERIT

STATE OF MICHIGAN)
)SS
COUNTY OF SAGINAW)

I, STEVEN JENSEN, being first duly sworn, say as follows:

1. I am a physician duly licensed to practice medicine in the State of Michigan and I am board certified in urology and was so certified in the year preceding 2003.

2. I have reviewed certain medical records concerning Marie Huddleston including but not limited to medical records from St. Joseph Mercy Hospital-Ann Arbor, radiology reports, office records of Dr. Leon, and CT scans of the abdomen from 2003 and 2008 from St. Joseph Mercy Hospital-Ann Arbor. I have further reviewed the Notice of Intent to file a Claim.

3. Based upon my review of these records, it is my opinion that had the 2003 CT scan of the abdomen been reviewed by a board certified urologist, that further testing would have revealed the presence of a malignancy. Further, that had the condition been diagnosed in 2003, there would have been done a wedge resection of the mass with a potential loss of anywhere between 10-20% of the kidney.

4. As a result of the delay in recognition of the tumor in 2003 and surgery not being done until 2008, it necessitated a radical nephrectomy with the complete removal of the kidney.

5. Had the surgery been done in 2003 as previously indicated it would have left Ms. Huddleston with a fully functioning kidney.

6. The loss of a kidney as has occurred in Ms. Huddleston's case can affect and will affect her ability to take certain medications which are known to have a deleterious effect on the kidneys as well as leave her vulnerable to being on dialysis if she were to suffer the loss of the remaining kidney.

7. The opinions that I have expressed in this Affidavit are preliminary opinions and I reserve the right to amend, alter or change my opinions upon receipt of additional information.

DR. STEVEN JENSEN

Subscribed and sworn to before me
on 4th day of May , 2009

Notary Public with raised seal

HELEN V. McKEE
Notary Public, Bay County, MI
My Commission Expires 12/18/2012

Personally known to me ohm or,
produced identification _____
Type of identification produced _____

(C)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

Marie Huddleston,

Plaintiff,

v.

Trinity Health-Michigan d/b/a Sisters of Mercy Health Corporation and/or St. Joseph Mercy Hospital - Ann Arbor, Huron Valley Radiology, P.C., IHA of Ann Arbor, P.C., d/b/a Associates in Internal Medicine-Cherry Hill, Associates in Internal Medicine-Cherry Hill, P.C., Dr. David E. Baker and Dr. Joyce Leon, Jointly and Severally,

Defendants.
_____/

Case No. 09 657 NH

Hon. Melinda Morris

Sherwin Schreier (P20065)
S. Schreier, P.C.
25892 Woodward Avenue
Royal Oak, Michigan 48067
248-548-4000
248-542-6301 – fax

Attorneys for Plaintiff

Cathy R. Bowerman (P26927)
One Towne Square, Suite 1400
Southfield, Michigan 48086
(248) 357-1400

Attorneys for Defendants Huron Valley Radiology, P.C. and Dr. David E. Baker

_____/

Clyde M. Metzger (P31040)
38777 West Six Mile Road, Suite 300
Livonia, Michigan 48152
(734) 742-1800

Attorneys for Trinity Health - Michigan

James E. Brazeau (P45566)
Jean Ann S. Sieler (P41820)
Robison, Curphey & O'Connell, LLC
Ninth Floor, Four SeaGate
Toledo, Ohio 43604
419-249-7900
419-249-7911 – fax

Attorneys for Defendants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. – Cherry Hill

DEFENDANTS JOYCE LEON, M.D. AND IHA OF ANN ARBOR, P.C.'S MOTION FOR SUMMARY DISPOSITION, BRIEF IN SUPPORT NOTICE OF HEARING, AND PROOF OF SERVICE

For their Motion for Summary Disposition under MCR 2.116(C)(8) & (10), Defendants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. – Cherry Hill, state:

1. Plaintiff Marie Huddleston alleges that she sustained harm as a result of a delayed diagnosis of her renal cancer from 2003 until 2008.

2. Defendant Dr. Joyce Leon was the Plaintiff's primary care physician.

3. In 2003, Dr. Leon ordered a CT scan of the Plaintiff's chest and abdomen for an evaluation of chest pain and to rule out aortic aneurysm dissection.

4. Dr. Leon received the CT report of the chest. Dr. Leon did not receive the CT report of the abdomen.

5. While questions regarding the delivery of reports may remain unresolved, such questions are not material as Plaintiff's own expert testified that the Plaintiff suffered no harm as a result of any of the Defendants' actions in this case.

6. After diagnosis of renal cancer in 2008, Plaintiff underwent a total nephrectomy and today has one kidney.

7. Plaintiff alleges that she would have been a candidate for a partial nephrectomy in 2003 but that, as a result of the delay, she was no longer a candidate for partial nephrectomy in 2008.

8. It is undisputed that Plaintiff required a surgical procedure to address the renal cancer whether that procedure occurred in 2003 or 2008.

9. Plaintiff's kidney function today is excellent and completely within normal limits. Plaintiff's expert has testified that Plaintiff has sustained no harm as a consequence of the delay.

10. Plaintiff asserts as her only injury and damages potential complications which may occur if there was an injury to her remaining kidney.

11. Under Michigan law, Plaintiff is unable to recover damages for theoretical complications which have not occurred. *Sutter v. Biggs,* 377 Mich 80 (1966); *Henry v. Dow Chemical Co.* 473 Mich 63 (2005). For this reason, Plaintiff has failed to state a claim upon which relief can be granted and/or Defendants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. are entitled to judgment as a matter of law.

Defendants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. – Cherry Hill request that this Court grant their Motion for Summary Disposition and dismiss the Plaintiff's claims with prejudice.

Respectfully submitted,

ROBISON, CURPHEY & O'CONNELL, LLC

James E. Brazeau
Ninth Floor, Four SeaGate
Toledo, OH 43604
(419) 249-7900
(419) 249-7911 - facsimile
Attorneys for Defendants Joyce Leon, M.D.
And IHA of Ann Arbor, P.C. – Cherry Hill

BRIEF IN SUPPORT

I. INTRODUCTION

Plaintiff asserts in her Complaint that she sustained harm as a consequence of a delay in the diagnosis of her renal cancer from 2003 until 2008. *See,* Plaintiff's Complaint, ¶22. Plaintiff underwent a CT scan of the abdomen in 2003 which noted the presence of a kidney tumor but Dr. Joyce Leon, Plaintiff's primary care physician, did not receive the report. Deposition of Dr. Leon, p. 42 Exhibit A. The tumor was ultimately diagnosed in 2008 when another CT scan of the abdomen was done. Plaintiff's Complaint, ¶17. Plaintiff asserts that in 2003 the tumor could have been surgically removed without removing the entire kidney but by 2008 the only available option was to remove the entire kidney leaving Plaintiff with one functioning kidney. Plaintiff's Complaint, ¶22.

Summary disposition is appropriate under MCR 2.116(C)(8) when "the opposing party has failed to state a claim on which relief can be granted." Further, summary disposition is appropriate under MCR 2.116(C)(10) when there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In response to Plaintiff's assertions, the undisputed evidence is that Plaintiff's present kidney function is excellent and completely within normal limits. Deposition of Plaintiff, p. 57 Exhibit B. This motion is based upon the undisputed testimony of Dr. Steven Jensen, Plaintiff's urological expert witness, who

has testified that Plaintiff has sustained no harm as a consequence of having a total nephrectomy in 2008 rather than a partial nephrectomy in 2003.

> Q. So long as Mrs. Huddleston's creatinine values continue to remain within normal limits and there is no clinical sign of renal dysfunction, would you agree with me that there is **no harm** to Mrs. Huddleston by the fact that she underwent a radical nephrectomy in 2008 rather than a partial nephrectomy in 2003?
>
> A. Correct, assuming those premises. (Emphasis added)
>
> Deposition of Dr. Jensen, pp. 25-26 Exhibit C.

Although Dr. Leon denies that a breach of the standard of care occurred, even if this Court views the facts in the light most favorable to the Plaintiff, Plaintiff's allegations do not give rise to a compensable injury.

In his deposition, Dr. Jensen recognized the possibility that Plaintiff could develop poorly controlled diabetes or hypertension which could harm the kidney, or could sustain trauma to the kidney from an auto accident but as Dr. Jensen recognized, these are only theoretical complications. Deposition of Dr. Jensen, pp. 21-22 Exhibit C. Moreover, Dr. Jensen recognized that diseases which are potentially harmful to the kidneys can very well cause kidney failure in patients with two kidneys. Deposition of Dr. Jensen, p. 23 Exhibit C. No study has shown that patients with two kidneys are less likely to go into kidney failure than a patient with one kidney.

II. ARGUMENT

As to the theoretical complications, Michigan case law is quite clear that Plaintiff is unable to recover damages for theoretical complications which have not occurred. *Sutter v. Biggs*, 377 Mich. 80, 139 NW2d 684 (1966). In *Sutter*, the Court

held that loss of an ovary and one fallopian tube as a consequence of malpractice did not expose the negligent physician to damages associated with the possibility of infertility. The Supreme Court of Michigan held:

> In the case before us, therefore, Plaintiff's loss of ability to bear children was not a legal and natural consequence of defendant's act, but within the meaning of the rule, was contingent, that is, contingent upon the possibility that plaintiff *could* develop a cyst on her remaining tube which *could* require excision of the tube itself.
> *Sutter* at 87.

As the Court held in *Sutter*, Plaintiff in the instant case has no legal basis to recover for an event which may or may not occur in the future.

Michigan case law also addressed the allegation that a defendant's alleged negligence created a risk or disease and a corresponding fear of contracting an illness. *Henry v. Dow Chemical Co.* 473 Mich 63 (2005). Plaintiff asserts that she may incur future damage to her remaining kidney. Under *Henry,* "if the alleged damages cited by plaintiffs were incurred in anticipation of possible future injury rather than in response to present injuries, these pecuniary losses are not derived from an injury that is cognizable under Michigan tort law." *Henry* at 73.

III. CONCLUSION

Plaintiff has failed to sustain her burden of proof that the outcome today would have been any different if she had undergone surgery for the kidney tumor in 2003 rather than in 2008. Notwithstanding the delay in the diagnosis, there simply was no harm from the delay as is clear from Plaintiff's own expert's testimony, and recovery is not permitted for what may or may not happen in the future. Therefore, Defendants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. – Cherry Hill respectfully request this

Court grant their Motion for Summary Disposition and dismiss the Plaintiff's claims with prejudice.

Respectfully submitted,

ROBISON, CURPHEY & O'CONNELL, LLC

James E. Brazeau
Ninth Floor, Four SeaGate
Toledo, OH 43604
(419) 249-7900
(419) 249-7911 - facsimile
Attorneys for Defendants Joyce Leon, M.D.
And IHA of Ann Arbor, P.C. – Cherry Hill